United Nations A/53/274/Add.1

General Assembly

Distr.: General
14 September 1998

Original: English

Fifty-third session
Item 150 of the provisional agenda*
Convention on jurisdictional immunities of States and their property

Convention on jurisdictional immunities of States and their property

Report of the Secretary-General

Addendum

Contents

		Page
II.	Replies received from States	2
	Germany	2

* A/53/150.

98-26768 (E) 071098

II. Replies received from States

Germany

[Original: English]
[28 August 1998]

General observations

1. Since the adoption of the draft articles by the International Law Commission (ILC) in 1991 and the informal consultations within the Sixth Committee in the years 1992–1994, States will have had the opportunity to reflect on the differences of opinion that have so far prevented a successful closure of the debate. Germany hopes that this period of reflection brought about by General Assembly resolution 49/61 of 9 December 1994 may have helped to identify and attenuate the existing differences of opinion concerning issues of substance arising out of the draft articles, in order to facilitate the conclusion of a universally acceptable Convention.

2. Germany maintains that the ILC draft articles are in serious need of further clarification and revision prior to the convening of a diplomatic conference on the conclusion of a Convention on State Immunity. As to the appropriate forums for such clarification and revision, Germany is of the opinion that all options, including the one foreseen in article 23, paragraph 2, of the statute of the International Law Commission, should be considered.

3. Germany has expressed its concerns regarding the present draft articles on many occasions. Those concerns still prevail and may be summarized as follows:

Specific observations

Article 2, paragraph 1 (b): Definition of a "State"

4. Germany agrees with the proposal of the Chairman of the informal consultations that the immunity of a constituent unit of a federal State (article 2, para. 1 (b) (ii)) could be recognized on the basis of a declaration made by a federal State. This is the approach taken by the European Convention on State Immunity (article 28),[1] which has proved to be sufficiently flexible in order to accommodate the different constitutional structures of the States parties to that Convention.

5. Thus, under article 28 of the European Convention, Germany has declared that her constituent States (*Länder*) may invoke the provisions of the Convention applicable to Contracting States and have the same obligations.

6. Germany, however, is not quite sure whether the inclusion of "political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State" (article 1, para. 1 (b) (iii)) under the term "State" would not unduly broaden the cases where immunity could be invoked. In the case of the European Convention, the expression "State" does not include any legal entity of a State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions; the courts may not, however, entertain proceedings in respect of acts performed by the entity in the exercise of sovereign authority (*acta jure imperii*).

Article 2, paragraph 1 (c), paragraph 2: Definition of "commercial transaction"

7. A focal point of the discussions of the draft articles has been the question of which criterion should prevail in determining whether a transaction is of a commercial or a non-commercial nature. Germany continues to maintain that only the objective nature of a transaction involving a foreign State and not its subjective purpose should determine whether the State is entitled to immunity. Legal transactions with foreign States would carry a risk impossible to calculate if the purpose of State actions were to constitute a criterion.

8. The various compromise proposals that did admit a reference to the criterion of purpose and were presented in the course of the discussions within the Sixth Committee are not satisfactory. Germany also has some doubts as to whether the basis for a compromise outlined by the Chairman of the informal consultations – namely, giving States the option of indicating the potential relevance of the purpose criterion under their national law and practice either by means of a general declaration in relation to the Convention or a specific notification to the other party in relation to a particular contract or transaction – would indeed introduce a greater measure of certainty. Since a general notification would not be able to take into account that the law and practice of a State might change, it would remain difficult for the private party to predict in which situations the contracting State would invoke immunity. Furthermore, issues of reciprocity would arise. A specific notification to the other party in relation to a particular contract or transaction would tend to favour the State party of the contract or transaction, since it does not require the consent of the private party.

Article 10, paragraph 3: Concept of a State enterprise or other State entity in relation to commercial transactions

9. Germany agrees with the Chairman of the informal consultations that, in certain cases, it may be appropriate to disregard the separate legal personality of a State enterprise or other entity and to have recourse to the State itself. Indeed, to exclude the possibility of such a recourse entirely would enable States to avoid financial liability for commercial transactions by setting up independent entities. The possible basis for a compromise as outlined by the Chairman is worthy of consideration.

Article 11: Contracts of employment

10. Germany shares the view of the Chairman of the informal consultations that some elements contained in draft article 11 need to be clarified. In general, as regards the granting of immunity in cases of contracts of employment involving a State, Germany supports protection of the employee to the greatest possible extent.

Articles 18 and 19: Measures of constraint against State property

11. Germany believes that the issue of State immunity from measures of constraint is an essential component of a possible Convention, without which it would be robbed of its justification. These measures of constraint include post-judgement measures as well as pre-judgement measures and should be subject to the same legal regime. The exclusion of measures of constraint intended to afford temporary protection could endanger the implementation of judgements against a State party in cases where it does not enjoy immunity.

12. Germany is of the view that the provision in article 18, paragraph 1 (c), according to which enforcement measures would be restricted to property with some connection to the claim, constitutes an overly far-reaching limitation of the liability of the foreign State engaging in commercial activities. Germany believes that the interest of a State is already sufficiently protected by the remaining limitations contained in articles 18 and 19.

Notes

[1] Council of Europe, *European Treaties, ETS* No. 74.